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Supreme Court, U.S.
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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARTHUR QUILLER, LILLIE MAE QUILLER, and All Other Persons Similarly Situated,

Cross-Petitioners,

v.

BARCLAYSAMERICAN/CREDIT, INC.,

Cross-Respondent.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does division 2 of the panel opinion reinstated by the en banc opinion of the United States Court of Appeals for the Eleventh Circuit give a mobile home finance company the right to claim federal preemption of an established state maximum rate of finance charge on the financing of a mobile home even though its contract with the consumer denies those concomitant consumer benefits mandated by Congress in the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, Title V, § 501, 94 Stat. 161 and the Regulations promulgated thereunder?

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OFFICIAL REPORTS OF OPINIONS BELOW

The panel opinion of the Eleventh Circuit Court of Appeals in *Quiller v. BarclaysAmerican/Credit, Inc.* is reported at 727 F.2d 1067 (11th Cir. 1984), and the *en banc* opinion of the Eleventh Circuit in said case is reported at 764 F.2d 1400 (11th Cir. 1985) (en banc). The opinion of the United States District Court for the Southern District of

Georgia dismissing cross-petitioners' complaint for failure to state a claim is unreported.

Copies of all three of the aforesaid opinions are included in the Appendix to BarclaysAmerican's Petition for Certiorari respectively at pages A1-A9, B1-B10 and C1.

STATEMENT OF THE GROUNDS OF JURISDICTION

The judgment sought to be reviewed was entered on July 8, 1985 *en banc* by the United States Court of Appeals for the Eleventh Circuit, which reinstated the panel opinion.

The within Cross Petition for Writ of Certiorari is presented within thirty days of receipt of the Petition for Certiorari pursuant to Rule 19.5 of this Court. The Quillers received the Petition for Certiorari on September 28, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Depository Institutions Deregulation and Monetary Control Act of 1980, 94 Stat. 161

Official Code of Georgia § 11-9-503

12 C.F.R. § 590.4

O.C.G.A. § 11-9-503 is set forth in Appendix A to this Cross-Petition for Certiorari. The Depository Institutions Deregulation and Monetary Control Act of 1980 (hereinafter referred to as DIDMCA) and Regulation are set forth on pages 2-3 of BarclaysAmerican Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The statement of the case is set forth in the statement of the case in the Quillers' brief opposing BarclaysAmerican's Petition for Certiorari and is incorporated herein by refer-

ence thereto. The contract in question is reproduced in the appendix to BarclaysAmerican's Petition for Writ of Certiorari: at I-1 to I-4 and M-8 to M-11.

ARGUMENT

Introduction

As the Quillers' brief opposing the petition for certiorari demonstrates,the Eleventh Circuit was absolutely correct in deciding that this particular contract authorized conduct which violates both DIDMCA and the Regulations and therefore did not qualify for protection under DIDMCA. However, in Division 2 of the panel opinion, reinstated *en banc*, the Eleventh Circuit held that to qualify for federal preemption under DIDMCA, the financing agreement need not contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure. This Cross-Petition for certiorari will show that holding effectively prevents the consumers from having the consumer benefits mandated by Congress in DIDMCA, § 501(c)(2).

The Quillers filed this Cross-Petition in order to preserve their right to urge this error in the event this Court grants BarclaysAmerican's Petition for Certiorari.

THE REASONS FOR GRANTING A WRIT OF CERTIORARI UPON THIS CROSS-PETITION

A. Division 2 Of The Panel Opinion Of The United States Court Of Appeals For The Eleventh Circuit Gives A Mobile Home Finance Company The Right To Claim Federal Preemption Of An Established State Maximum Rate Of Finance Charge On The Financing Of A Mobile Home Even Though Its Contract With The Consumer Denies Those Concomitant Consumer Benefits Mandated By Congress In DIDMCA.

The opinion of the Eleventh Circuit in this case contains an inherent contradiction. On one hand, the Court held

"that Congress included manufactured home financing in its preemption scheme *only* on the condition that consumer-debtors would be *guaranteed* certain safeguards," and that BarclaysAmerican "may not claim the benefits of the federal law while at the same time failing to provide the *consumer protections* that are the *price* of those benefits." *Quiller v. BarclaysAmerican Credit, Inc.*, 727 F.2d 1067, 1071 (11th Cir. 1984). (Emphasis added.) This is consistent with the language of DIDMCA § 501(c) that it shall not apply "unless the terms and conditions relating to such loan . . . comply with consumer protection provisions . . ."

On the other hand, the Court agreed with Barclays-American and the office of General Counsel of the Federal Home Loan Bank Board ("FHLBB") that in order to qualify for federal preemption "the financing agreement need not contain an express term *guaranteeing* the debtor thirty days notice before repossession or foreclosure." (Emphasis added.) *Id.*, p. 1071. But there is no right, and no guarantee of a right, unless the right is such that it can be enforced in a court by the consumer. A right which is unenforceable is no right.

There is no right to notice to cure default or to notice prior to repossession unless those rights are stated in the contract. The general rule of American law is that the right to repossess is absolute once default has occurred and the secured party may immediately repossess without notice—UNLESS OTHERWISE PROVIDED IN THE CONTRACT. If it is not in the contract, there is no right to notice prior to repossession. 75 A.L.R. 3rd 1061, et seq. (1977); 29 A.L.R. Fed. 418, et seq. (1977); Uniform Laws Annotated, Uniform Commercial Code, Master Edition, 9-503, Note 8; 69 Am Jur 2d, Secured Transactions, § 598.

Georgia follows that general rule. *Ford Motor Credit Company v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978). That

case held there was no cause of action for wrongful repossession without notice because there was no right to notice in the contract. The Quiller contract contains language almost identical to that in *Ford Motor Credit Company v. Hunt*, *supra*.

In *Quiller*, the language, in addition to that quoted by the Eleventh Circuit, contained the following: "Upon default, Holder shall have all of the remedies of a secured party under the Uniform Commercial Code." (727 F.2d at 1071-1072). In *Ford Motor Credit Company, v. Hunt*, *supra*, the language was: "Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable and seller shall have all the rights and remedies of a secured party under the Uniform Commercial Code including the right to repossess the property . . ."

Assume that the Quillers attempted to enforce their alleged right, to a thirty-day notice of default and to cure in any court in Georgia, state or federal. It is absolutely certain that the state court, and the district court applying state law, would grant the lender's motion for summary judgment or directed verdict. The same result would happen in almost all the other states that have adopted the UCC.

Counsel for FHLBB take the position, in their briefs in the Eleventh Circuit, that general counsel for FHLBB made a clear decision that the right to the thirty-day notice of default and to cure does not have to be recited in the contract. The argument is then made that the decision of the general counsel for FHLBB must be given such deference by the Courts as to make that decision binding.

Deference to an unofficial opinion of counsel for a federal agency is not equivalent to blind obedience. This Court has explained clearly the interaction between deference to the

interpretation of a federal agency and judicial review. The language applies directly to this case.

In *Securities Industry Association, et al, v. Board of Governors of the Federal Reserve System, et al*, 468 U.S. ____; 82 L.Ed.2d 107 (1984), this Court considered an interpretation of the Federal Reserve Board of a provision of the Banking Act of 1933. The Board has primary responsibility for implementing that act and the Court was requested to give deference to the Board's interpretation of the act. It refused.

This Court pointed out that "we accord substantial deference to the Board's interpretation of that Act whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent . . . We have also made clear, however, that deference is not o be a device that emasculates the significance of judicial review." Judicial deference to an agency's interpretation of the statute "only sets the framework for judicial analysis; it does not displace it." ". . . A reviewing court" must reject administrative constructions of [a] statute, whether reached by adjudication or by rule making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." 82 L.Ed. 2d at 113. With reference to rationalizations by counsel for the agency, the Court stated:

> We previously have stated that post hoc rationalizations by counsel for agency action are entitled to little deference: 'It is the administrative official and not appellate counsel who possess the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.' . . . As a result, the Board's presentation here of the policies behind the Act as they apply to this case is of less significance than it would be

if it had occurred at the administrative level. 82 L.Ed. 2d at 113-114.

B. Sound Policy Dictates Strict Compliance With DIDMCA So That The Consumers Will In Fact Get The Benefits Mandated By Congress.

Division 2 of the panel opinion of the Eleventh Circuit, in sustaining the position of BarclaysAmerican and the office of General Counsel of the FHLBB, is contrary to the legal concept of a contract. Under that division, whether a contract is within or without the scope of DIDMCA cannot be determined at the time of execution by reading it. A determination as to whether a contract is within or without the scope of DIDMCA can only be made during the term of the contract and is dependent upon the conduct and actions of the creditor.

Moreover, BarclaysAmerican and the office of General Counsel of the FHLBB take the position that contract language is irrelevant. Language reserving to the creditor rights, inconsistent with DIDMCA and the implementing regulations, is irrelevant. Whether the contract is within or without the scope of DIDMCA is not determined at the time the contract is executed and delivered, but later during the term of the contract and determination is made depending upon the conduct and actions of the creditor. This is a new method of construing a contract.

The practical effect of Division 2 of the Eleventh Circuit's holding is that the finance company can have an option, not disclosed in the contract, during the term of the contract, to come within or without the scope of DIDMCA—and still charge a finance charge above the level permitted by state law. As there is no way to tell in advance whether the contract was within or without the scope of DIDMCA, the finance company is permitted to make its election—in or

out—later depending on the circumstances and what would be to its advantage.

With such an undisclosed option, what would the understanding of the parties be? How could that be a contract with mutuality? How would that square with the concept of a contract being an understanding between two parties to do or not do a specific thing?

It is submitted that the informal opinion of the office of General Counsel of the FHLBB, that the right to a thirty-day notice need not be set out in the contract, is demonstrably irrational. If the consumer is to have the rights mandated by Congress, then he must be able to enforce them in a court.

CONCLUSION

For the reasons set forth in the within Cross-Petition, if this Court grants BarclaysAmerican's Petition for Writ of Certiorari, this Court should grant this Cross-Petition for the writ of certiorari to review Division 2 of the panel judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

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No. 85-____

OCGA § 11-9-503 and UCC § 9-503. Secured party's right to take possession after default.

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Code Section 11-9-504. (Code 1933, § 109A-9-503, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1978, p. 1081, § 1.)